Public Prosecutor v Lee Yau Ket

HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NO 45–115 OF 2004
NALLINI PATHMANATHAN JC
2 MAY 2008

Criminal Law — Dangerous drugs — Trafficking — Whether prosecution established a prima facie case — Missing evidence — Whether there was a gap or break in chain of evidence — Whether gap in chain of custody of seized items threw doubt on identity of seized items

A customs officer who was on duty at one of the customs counters located in the KLIA upon noticing the suspicious behaviour of the accused asked the accused to open his luggage for inspection. When the accused unlocked and opened the suitcase it was found, concealed under blue partition and sheet of carbon paper, a large quantity of red and green pills in small clear plastic bags which were grouped and placed in larger clear plastic packs. There were a total of 17 of the large clear plastic packs. After the discovery, the investigating officer and two officers from the Narcotics Division were called. The investigating officer ('IO') thereafter read out the caution/warning under s 37 of the Dangerous Drugs Act 1952 ('the Act') to the accused and the same was translated into the Chinese language by one of his officers. Subsequently, all the items seized from the accused were formally handed over to the IO. The IO in turn noted this on the form surrendering the various items into his custody. This form did not, however, set out a list of the items within the suitcase but merely referred to the suitcase and its contents as a whole. In the IO's office, after further questioning of the accused, the 17 large plastic packs containing the red and green pills were marked, signed and dated by the IO. The accused was subsequently charged with trafficking in dangerous drugs namely 2,739g of 3.4 MDMA in contravention of s 39B of the Act. The prosecution submitted that it was relying on the statutory presumption in s 37(d) of the Act to establish that the accused had the requisite knowledge of the existence and nature of the 2,739.9g of 3.4 Methylenedioxymethamphetamine (MDMA) and he was therefore in possession of the prohibited drugs. In the interim two matters arose with regard to the seized items. Firstly some layers of the suitcase under which the pills were discovered were lost or went missing. The second discrepancy arose in respect of the missing smaller packs in one of the large plastic pack of pills.

Held, acquitting and discharging the accused:

(1) As the quantity of the drugs was in excess the quantity that he could personally consume and as he was discovered transporting them from one jurisdiction to another, he was trafficking. The burden on the prosecution at the close of the prosecution's case was to make out a prima facie case and therefore the issue for consideration before the court was whether the prosecution had discharged this burden. In the instant case, in order to establish the element of trafficking against the accused, it is necessary in the first instance to prove that the accused was in 'possession' of the 2,739g of 3.4 MDMA. In this regard it has to be proven that the accused had physical custody and control of the drugs. It was not in dispute that the subject drugs were found concealed within the accused's suitcase and this taken in conjunction with s 37(d) of the Act, satisfied the requirement that the element of 'possession' which was essential in order to go on to establish trafficking, had been satisfied (see paras 34, 37 & 39).

(2) In the facts, it became necessary to consider the issue of the identity of the drugs, so as to ascertain whether the drugs tendered in court and comprising the subject matter of the charge were in fact, the same drugs that were seized from the accused and subsequently tested by the chemist. The burden was therefore on the prosecution to establish that there was no break in the chain of evidence relating to the custody of the drugs. However, two discrepancies have arisen in this case, which gave rise to the question as to whether there was a gap in the chain of evidence tendered by the prosecution. The gap also threw doubt on the identity of the drugs that were subsequently sent to the chemist for forensic evaluation. At the same time, no evidence was adduced by the prosecution to specifically address the discrepancies or the missing items. Instead, the prosecution relied on its chain of evidence to maintain that the identity of the drugs was not put in issue. It was the non-explanation of the missing items by the prosecution that had given rise to the break or gap in the chain of custody of the drugs. From the chronology of events, it was evident that there was indeed a gap in the chain of custody or evidence relating to the drugs recovered from the accused. The gap brought into question too many possibilities as to what happened to the seized items during that lacuna in the chain of custody, such that it could not be definitively concluded, without any doubt, that the remaining evidence were left untampered or unaltered. A consideration of the totality of the evidence lead to the conclusion that doubt was thrown on the identity of the drugs comprising the subject matter of the charge by reason of the clear gap in the chain of custody (see paras 40–41, 45, 53, 57 & 66).

(3) The gap in the evidence also threw some doubt on the veracity of the IO. It was no longer clear beyond doubt that all the items seized and marked as exhibits were within his control and custody or securely locked away at all times (see para 53).

[Bahasa Malaysia summary

Seorang pegawai kastam yang bertugas di salah satu kaunter di KLIA, apabila menyedari kelakuan yang mencurigakan oleh tertuduh telah meminta tertuduh untuk membuka bagasinya untuk diperiksa. Apabila tertuduh membuka kunci dan beg pakaian, adalah dijumpai, tersembunyi di bawah pemetakan biru dan kertas karbon, satu kuantiti yang besar pil berwarna merah dan hijau di dalam beg plastik kecil yang mana dikumpulkan dan diletakkan di dalam bungkusan plastik besar. Terdapat sejumlah 17 bungkusan plastik besar. Selepas pertemuan, pegawai penyiasat dan dua orang pegawai daripada Bahagian Narkotik telah dipanggil. Pegawai penyiasat ('IO') kemudiannya membacakan peringatan/amaran di bawah s 37 Akta Dadah Berbahaya 1952 ('Akta tersebut') kepada tertuduh dan ianya telah diterjemahkan ke bahasa Cina oleh salah seorang pegawainya. Selanjutnya, kesemua barangan yang telah dirampas daripada tertuduh telah secara rasminya diserahkan kepada IO. IO telah mencatatkanya di dalam borang penyerahan pelbagai barang dalam jagaannya. Borang tersebut tidak menyenaraikan barangan di dalam beg pakaian tetapi hanya merujuk kepada beg pakaian dan kandungannya secara keseluruhan. Di dalam pejabat IO, selepas menyoal tertuduh, 17 bungkusan besar plastik yang mengandungi pil-pil yang bewarna merah dan hijau telah ditanda, ditandatangani dan ditarikhkan oleh IO. Tertuduh kemudiannya didakwa dengan mengedar dadah berbahaya iaitu 2.739g 3.4 MDMA yang melanggar s 39(b) Akta tersebut. Pihak pendakwaan menghujahkan bahawa, ianya bergantung kepada anggapan statutori di dalam s 37(d) Akta tersebut untuk membuktikan bahawa tertuduh mempunyai syarat pengetahuan berkenaan dengan kewujudan dan sifat 2.739g 3.4 Methylenedioxymethamphetamine (MDMA) dan oleh itu beliau memiliki dadah yang dilarang. Sementara itu, dua perkara berbangkit berkenaan dengan barangan yang dirampas. Pertama, beberapa lapisan beg pakaian di mana pil-pil ditemui telah tiada atau didapati hilang. Percanggahan kedua timbul berkaitan dengan kehilangan bungkusan kecil di dalam salah satu bungkusan besar plastik pil-pil tersebut.

Diputuskan, membebaskan dan melepaskan tertuduh:

(1) Memandangkan kuantiti dadah melebihi kuantiti yang tertuduh boleh gunakan secara peribadi dan memandangkan tertuduh telah ditemui membawanya dari satu bidang kuasa kepada bidang kuasa yang lain tertuduh didapati mengedar. Beban pada pihak pendakwaan di akhir

kes pendakwaan, untuk membuktikan kes prima facie dan oleh itu isu untuk pertimbangan di hadapan mahkamah adalah sama ada pihak pendakwaan telah melepaskan beban tersebut. Dalam kes ini, untuk membuktikan elemen mengedar terhadap tertuduh, adalah penting pada awalnya membuktikan bahawa tertuduh adalah 'memiliki' 2.739g 3.4 MDMA. Berkenaan dengan perkara ini ianya perlu dibuktikan bahawa tertuduh mempunyai jagaan dan kawalan fizikal terhadap dadah tersebut. Adalah tidak dipertikaikan bahawa dadah tersebut telah ditemui tersembunyi di dalam beg pakaian tertuduh dan menurut s 37(d) Akta tersebut, memenuhi syarat bahawa eleman 'milikan' yang mana adalah penting untuk meneruskan bagi membuktikan pengedaran telah dipenuhi (lihat perenggan 34, 37 & 39).

(2) Oleh itu, ia menjadi penting untuk mempertimbangkan isu identiti dadah, yang mana untuk memastikan sama ada dadah yang dikemukakan di mahkamah dan subjek yang terdapat dalam pertuduhan adalah dadah yang sama dirampas daripada tertuduh dan seterusnya diuji oleh ahli kimia. Oleh itu bebanan adalah ke atas pihak pendakwaan untuk membuktikan bahawa tidak putus rantaian bukti berkaitan dengan jagaan dadah tersebut. Tetapi, dua percanggahan telah timbul dalam kes ini, yang menimbulkan persoalan sama ada terdapatnya jurang dalam rantaian bukti yang dikemukakan oleh pihak pendakwaan. Jurang tersebut juga melontarkan keraguan terhadap identiti dadah yang selanjutnya telah dihantar kepada ahli kimia untuk penilaian forensik. Pada masa yang sama, tiadanya bukti yang dikemukakan oleh pihak pendakwaan untuk menumpukan secara spesifik percanggahan atau barangan yang hilang. Sebaliknya, pihak pendakwaan bergantung kepada rantaian buktinya untuk mengekalkan bahawa identiti dadah tidak diletakkan sebagai isu. Tiada penjelasan berkenaan dengan kehilangan barangan oleh pihak pendakwaan bahawa telah menimbulkan putusnya atau jurang dalam rantaian penjagaan dadah tersebut. Daripada kronologi kejadian, adalah dibuktikan bahawa terdapatnya jurang dalam rantaian penjagaan atau bukti berkaitan dengan dadah yang ditemui daripada tertuduh. Jurang tersebut membawa persoalan begitu banyak kemungkinan berkenaan dengan apa yang telah berlaku kepada barangan yang dirampas semasa lacuna di dalam rantaian penjagaan, dengan ini ianya tidak boleh disimpulkan secara muktamad, tanpa keraguan bahawa baki bukti ditinggalkan tidak diusik atau diubah. Pertimbangan terhadap keseluruhan bukti membawa kepada kesimpulan bahawa keraguan telah dilemparkan terhadap identiti dadah yang menjadi subjek pertuduhan disebabkan jurang yang jelas dalam rantaian penjagaan (lihat perenggan 40–41, 45, 53, 57 & 66).

(3) Jurang dalam bukti juga melontarkan beberapa keraguan berkenaan dengan kebenaran IO. Ianya tidak lagi jelas melangkaui keraguan

A bahawa kesemua barangan yang dirampas dan ditandakan adalah di dalam kawalan dan jagaan atau dikunci secara selamat sepanjang masa (lihat perenggan 53).]

Notes

B For cases on trafficking in dangerous drugs, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–139.

Cases referred to

C *Gunalan a/l Ramachandran & Ors v PP* [2004] 4 MLJ 489 (refd)
Lee Chee Meng v PP [1992] 1 MLJ 322 (refd)
Kumaraguru a/l N Muniandy & Ors v PP [1994] 1 MLJ 254 (refd)
Mohd Osman bin Pawan v PP [1989] 2 MLJ 110 (refd)
PP v Por Chong Beng [1996] 4 MLJ 467 (refd)
D *PP v Rosli bin Rikidin* [2007] 4 MLJ 377 (refd)
Shamsuddin bin Hassan & Anor v PP [1991] 3 MLJ 314 (refd)
Su Ah Ping v PP [1980] 1 MLJ 75 (refd)

E **Legislation referred to**
Criminal Procedure Code s 180
Dangerous Drugs Act 1952 ss, 37, 37(d), 38B, 39B, 39B(1), 39B(1)(a), 39B(2)

F *Mohd Zaki bin Mohd Salleh (Deputy Public Prosecutor, Royal Customs Department) for the prosecution.*
SL Yong (LL Yong with her) (Yong & Co) for the accused.

Nallini Pathmanathan JC:

G

[1] On 4 November 2003 Lee Yau Ket ('the accused') was arrested and detained at the Kuala Lumpur International Airport ('KLIA') after officers of the Customs Department found a large quantity of pills wrapped in clear H plastic packing concealed in a large suitcase he was carrying. After an investigation and analysis of the pills seized was undertaken, the following charge was preferred against the accused:

I That on 14 November 2003 at about 7.20am at counter No 6 of the Pemeriksaan Kastam Unit Khas Pemeriksaan Penumpang (the Customs Special Unit for Investigation/Examination of Passengers) at KLIA Kuala Lumpur in the district of Sepang, Selangor you were found to be trafficking in dangerous drugs namely 2,739g of 3.4 Methylenedioxymethamphetamine ('MDMA'). As such you have committed an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 (Act 234) and is punishable under s 39B(2) of the said Act.

FACTS OF THE CASE

[2] The facts are relatively straightforward. On the morning of 4 November 2003, one Muhamed Nor Azam bin Mohd Nasir ('SP3'), a customs officer tasked with the examination of the baggage of randomly selected passengers, was on duty at one of the customs counters, namely counter 6. It comprises a part of the Customs Special Unit for Investigation/Examination of Passengers Unit which is located in the baggage delivery hall at the Kuala Lumpur International Airport. Counter 6 is located between the baggage carousels where passengers collect their luggage, and the exit from the delivery hall. A yellow line which runs the length of the customs counters marks the area delineated to the Royal Malaysian Customs and Excise Department, Malaysia. Counter 6 is also immediately adjacent to a broad passage leading to the exit of the hall, known as the 'green lane'. It is utilised by passengers who have no taxable/dutiable goods to declare.

Search conducted at the Royal Customs and Excise counter in Kuala Lumpur International Airport ('KLIAM')

[3] At 7.20am on the morning of 4 November 2003, SP3 noticed a passenger whom he described as behaving in a manner which 'aroused his suspicions'. This passenger was the accused. He initially noted the accused when the accused was waiting at carousel 'D', situated opposite counter 6. The accused then started to advance hesitatingly towards the green lane. It was the passenger's hesitation that caught SP3's attention. When the accused passed the yellow line demarking the customs boundary, SP3 stopped him.

[4] SP3 enquired where the accused had come from, and was informed that he had just flown in from Frankfurt after a stay of five days. SP3 then asked that he open his luggage for inspection. The accused was carrying one item of hand luggage (a black cloth bag which was carried on his shoulder marked as exh P69) and a large cloth suitcase bearing the tradename 'Polo' (exh P60). The suitcase was locked with a padlock. Also attached to the handle of the suitcase was the baggage tag for the suitcase (exh P66), bearing the accused's name and his flight details as well as the reference number for his baggage. The accused unlocked the padlock and opened the suitcase, exh P60. There was a leather jacket and clothing in the suitcase. Underneath all the clothing was a partition made of cardboard with the logo 'Polo' printed all over the partition (see photographic exh P59 E). It was blue in colour. Attached or glued onto the underside of this blue board partition was a sheet of carbon paper. Beneath this blue board partition with the 'Polo' logo and carbon on its underside, was another loose sheet of carbon paper (see photographic exh P59 F).

[5] Concealed beneath this sheet of carbon paper was a large quantity of red and green pills in packs. These pills were immediately visible as they had been packed in small clear plastic bags/packs which were in turn stacked or grouped together and placed in larger clear plastic packs. There were a total of seventeen large clear plastic packs containing a multitude of these green and red pills, (see photographic exh P59 G). Beneath these plastic packs of pills was a white sheet of paper covering another board partition below which was the hard base underside of the suitcase. The underside of this second board partition also had carbon paper partially affixed to it (see photographic exh P59 H).

[6] When SP3 opened the first blue board partition and discovered the pills beneath the sheet of carbon, the accused, according to SP3, said 'Tolong'. SP3 did not respond to this statement, but instructed the accused to shut his bag and took possession of the accused's passport. He then left the accused to remain alone at counter 6 while he went in search of his immediate superior, a senior customs officer, Yahya bin Mokhtar ('SP4') to ascertain whether the pills were prohibited items. SP4's office was located some fifteen feet from counter 6. SP3 expended about five minutes explaining what he had found in the accused's suitcase to SP4 before returning to counter 6.

Steps taken after the discovery of the large number of pills concealed in the suitcase carried by the accused

[7] When SP3 returned to counter 6, he found that the accused was no longer there. SP3 walked around looking for him and found him seated on a sofa in the area behind the baggage carousels, with his luggage next to him. He had made no attempt to get away.

[8] SP3 instructed the accused to follow him to another superior officer's room, which the accused duly did, dragging his large suitcase on wheels behind him. As they were walking along, SP3 maintains that the accused offered him some money, which he, SP3, rejected. SP4 and one Rosdi bin Mamat joined the accused and SP3 on their walk to the superior officer's room. The accused was ushered into the room of one Tuan Haji Hamid bin Hashim ('SP5'), a senior customs officer.

[9] The accused's passport was surrendered to SP5 and the accused and his luggage deposited in SP5's office. SP5 instructed the accused to open the bag once again and noted the green and red pills concealed beneath the layers of clothing, board and sheets of carbon paper. A record was taken of the accused's passport, his flight ticket and his baggage tag. The Narcotics Division was duly contacted and officers from that unit arrived after about an

hour. They included the investigating officer in this case, one Amaludin bin Gimin ('SP6') and two others.

Investigation conducted by the Narcotics Division of the Royal Customs and Excise Department

[10] When SP6 and his two officers arrived at SP5's office, SP6 read out the caution/warning under s 37 of the Dangerous Drugs Act 1952 and explained what it meant to the accused. This was translated into the Chinese language by one of his officers. SP6 then questioned the accused to ascertain, inter alia, whether the suitcase with him was the same one that had been examined by SP3. According to SP6, the accused confirmed that it was the same suitcase. A body search was then conducted but no further prohibited goods were found on the accused. All of the items seized from the accused were then formally handed over to SP6 who noted this on the form surrendering these various items into SP6's custody, (exh P68). However exh P68 did not set out a list of the items within the suitcase, nor did it list specifically the numerous packs of pills found within the suitcase carried by the accused. It merely referred to the suitcase and its contents as a whole.

Photographs taken of the evidence seized on 4 November 2003

[11] SP6 and his two officers then escorted the accused into a van and took him to the Customs Narcotics Office in Lengkok Bellamy. The accused and the seized items were taken into SP6's office. SP6 then asked the accused to replicate the state of the suitcase (exh P60) prior to it being examined by SP3. The accused duly complied, placing the lock back on the suitcase, exh P60. The accused explained that the combination lock for the suitcase was not functional. As the accused re-enacted the events of the morning, SP6 instructed a customs photographer, one Zulkifli bin Shahadan ('SP2') to take photographs at each stage. Hence the photographs captured in exh P59 disclose the original state of the bag and its contents as each layer within the suitcase was removed (exhs P59B–P59H).

Identification and marking of the plastic packs of pills found in the suitcase

[12] SP6 then marked the plastic packs containing the red and green pills. There were seventeen large clear plastic packs which he marked A1 to A17, also placing on them his signature and the date. A photograph was taken of these seventeen large clear plastic packages, (exh P59 I).These seventeen clear large plastic packs were then opened to reveal the numerous smaller clear plastic packs containing pills. Each of the seventeen larger packs marked A1 to A17 contained anything from eight to fifteen smaller packs. Each of these

smaller packs was then also individually marked or tagged by SP6 in the presence of the accused, SP2 and his two other officers.

[13] These smaller packs were marked in accordance with the larger pack in which they were contained. For example the twelve smaller packs in A1 were marked A1.1 to A1.12. In such manner every single pack of pills was marked. Photographs were then taken of these smaller packs which were laid out neatly on a board, (exh P59 Q). It is pertinent to note at this stage that the package marked A11 contained fifteen smaller clear plastic packs of which seven contained red pills and eight, green pills.

[14] SP6 also chose several sets of clothing from the suitcase and instructed the accused to change into these clothes, one after another. These clothes were also tagged. The several sets of clothing fit the accused and photographs were taken of him in each set of clothing (exhs P59 J to P).

Events after the photography session and marking of the pill exhibits

[15] After the photography session, which was over by about 1.15pm on 4 November 2003, SP6 gave evidence that he placed all the items back into their 'original condition' while awaiting instructions from the Deputy Director of Customs about a press conference that was to be held at the customs offices in Lengkok Bellamy. The press conference was eventually held between 2.15pm and 3.15pm. In the interval between the photography session and the press conference SP6 maintained that all the exhibits were kept in his custody in his office. During that time his two officers also remained in his office with him.

[16] For the purposes of the press conference, SP6 took with him the suitcase (exh P60) and its contents. He maintained that the suitcase remained with him at all times. The hand luggage which had been carried by the accused (exh P69) was locked in a steel cabinet in his office.

[17] After the press conference, SP6 explained that he stored the exhibits which had been taken to the office where the press conference had been held. According to him, he placed the exhibits comprising pills, namely the seventeen large plastic packs containing the smaller packs of pills, in a steel cabinet in his office. These exhibits were therefore locked in the steel cabinet which was further secured with a padlock. The rest of the exhibits were placed in his office and also locked. Then he and his team escorted the accused to the magistrate's court in Sepang to obtain a remand order.

[18] They returned from the magistrate's court with the remand order later that afternoon. SP6 then proceeded to prepare a detailed list of each item that

was seized from the accused. The entire contents of the suitcase and hand luggage carried by the accused had to be itemised individually. Those items that were seized from his person and the contents of the hand luggage as well as the contents of the suitcase were set out in a list marked as exh 72. The pills that were seized were counted in toto and set out in a separate schedule marked exh 72A. It details the number of smaller packs found in each of the larger clear plastic packs marked A1–17 respectively, as well as the number of pills in each of the smaller packs. In short the total number of pills seized was detailed in exh P72A.

[19] However two matters which require further consideration arise in relation to the contents of the suitcase, exh P60. They relate to the fact that some 'layers' of the suitcase were lost or went missing. Additionally, a discrepancy arises in respect of the number of packs of pills that were itemised and marked in exh P72A as compared to the photographic evidence in exh P59Q.

(a) The carbon sheet comprising the underside of the blue board artition and the carbon sheet beneath which the pills were concealed within the suitcase. Exhibit P60 are missing.

[20] It will be recalled that there were several layers within the suitcase, exh P–60 as described above and captured in the photograph exhs P59F, G and H. As stated earlier, the subject pills were discovered concealed beneath the blue partition board layer with a carbon sheet on its underside and another loose sheet of carbon paper.

[21] SP6 testified that when he returned from court after obtaining the remand order on 4 November 2003, he '... *left the two sheets of carbon at a front counter* ..'. When he returned, these two sheets of carbon were missing. SP6 testified that he looked for the sheets of carbon in all the waste bins, fearing the cleaner had thrown them away as rubbish, but to no avail. These two carbon sheets which can be seen in the photographs taken in the late morning and afternoon of 4 November 2003 went missing as of that date. Several queries arise here which will be examined in depth later:

(i) It is not apparent how or why the carbon sheet that comprised the underlayer of the blue board partition had become unstuck or separate from the board;

(ii) SP6 did not explain why he had left the two sheets of carbon at the front desk.

(b) There is a discrepancy between the number of smaller packets of pills photographed in the exh P59 Q and that formally recorded in the list of seized pill exhibits, exh P72A.

[22] A careful consideration of the photograph exh P59Q, which was taken when all the seized items had been identified and marked on 4 November 2003 before 1.15pm will show that the large clear plastic pack identified as A–11 contained fifteen smaller clear plastic packs, more specifically seven small packs with green pills and eight small packs with red pills.

[23] However a perusal of the list exh P72A reveals the existence of only fourteen such smaller packs comprising the contents of the large plastic pack, All. This, despite the fact that the photograph, exh P59Q and the list exh P72A were made on the same day.

[24] After P6 had prepared the list of exhibits in exh P72 and exh P72A he took the accused to the police station at Jalan Pantai and left him there for the night. The following day, he collected the accused, took him back to his office and in front of him repacked the contents of the large clear plastic packs which had been marked A1 to A17 into individual envelopes marked respectively as AG1 to AG17 which were then sealed with the seal of the Royal Customs Department of Malaysia.

[25] For example, the large plastic package A1 was opened and the twelve smaller packets each containing 100 green pills with the logo 'CU' on them, were placed into an envelope which was then sealed and marked as 'AG–1'. SP6 repeated the same exercise for the rest of the sixteen large clear plastic packs, A2 to A17 and marked them 'AG–2 to 'AG–17' respectively. SP6 then wrote the investigation paper number for this particular case on each of the seventeen envelopes, (exhs P–73A–Q). It took no less than two hours to complete this exercise after which SP6 replaced the seventeen envelopes in his steel cabinet which was then locked.

The analysis of the pills by the chemist

[26] Later on that afternoon on 5 November 2003 at about 3.10pm SP6 personally handed over the seventeen marked and sealed envelopes, AG1 to AG17 to a chemist from the Chemistry Department, one Wan Rahimah ('SP1') for analysis. The exhs AG1 to AG17 were accompanied by a form requesting that an analysis be conducted, (exh P4). Annexed to the form was a list of the total number of pills and packets contained as a whole in each of the seventeen envelopes, AG1 to AG17. The number of pills and packs as set out in exh P4 matches the list in exh P72A.

[27] SP1 opened the sealed envelopes and counted the seventeen packages in front of SP6. Having confirmed the contents of the seventeen envelopes, SP1 took custody of the pills in all seventeen envelopes and issued a receipt for the same. She placed the relevant markings on these exhibits and then stored them in a locked cabinet (to which only she had the keys) in a strong room. The following day she began her analysis on the pills contained in the envelopes AG1 to AG17.

[28] Although SP1 said in her evidence that she made a note of describing the pills, taking pictures and even measuring the diameter of the green and red pills, there is no description whatsoever of the subject pills. SP1's evidence relating to the pills was only a general statement to the effect that they were either red or green in colour, and that the red pills had the 'Euro' currency logo on it while the green pills carried the logo 'CU'.

[29] As a consequence the court was unable to ascertain or visualise the precise colour, size and shape of the pills, not to mention the defining feature of a logo embossed on each of the pills. The evidence that the chemist stated that she recorded relating to the physical features of the pills should have been produced by the chemist as it would have assisted the court in ascertaining the nature and identity of the pills that had been handed over for analysis by SP6.

[30] SP1 duly analysed the pills both qualitatively and quantitatively to ascertain the exact quantity of prohibited drugs, if any, in these samples, by first grinding the green pills and red pills in each envelope (AG1–AG17) separately and then taking representative samples of the pills after they had been ground. The samples were then subjected to Gas Chromatography Mass Spectrometry ('GCMS') which disclosed the existence of 3–4 MDMA in the pills. From the results of the GCMS tests, which take the form of a chromatogram, SP1 was able to calculate the quantity of active ingredients in the respective samples. She found that the total weight of 3.4 MDMA in all of the green and red pills amounted to 2,739g. She also prepared a chemists' report confirming her findings, (exh P6).

[31] SP1 handed over her report and the balance of the pills after analysis as well as all exhibits back to SP6 on 7 June 2004, some seven months later. The period of seven months to analyse the pills is a relatively lengthy period. While this in itself may not generally have great significance, in the context of pills such as MDMA, where the date of expiry may well be short, the readings that are obtained after such a long period may not accurately reflect the actual quantity of a particular drug in that pill.

[32] The balance of the pills after analysis as packaged by the chemist was then stored by SP6 in the safe in his office and locked. It was subsequently produced at the trial of this matter. Based on the chemist's report as well as the facts outlined above, the accused was duly charged with the trafficking of 2,739g of 3.4 MDMA at the Customs Special Unit for Investigation/Examination of Passengers Unit in KLIA on 4 November 2003 at 7.20am. The foregoing then are the brief facts of the matter.

BURDEN ON THE PROSECUTION

[33] The burden on the prosecution at the close of the prosecution case is to make out a prima facie case as is encapsulated in s 180 of the Criminal Procedure Code.

THE INGREDIENTS OF THE CHARGE AGAINST THE ACCUSED

[34] In order to make out a prima facie case against the accused, the prosecution is bound to prove the following elements or ingredients of the charge preferred against the accused, namely:

(i) on 4 November 2003 at 7.20am at the Customs Unit in KLIA;

(ii) the accused was trafficking in dangerous drugs namely 2,739g of 3.4 Methylenedioxymethamphetamine ('MDMA') in contravention of s 39B of the Dangerous Drugs Act 1952.

Element (i): The date, time and place

[35] These facts have been proved by the evidence of, inter alia, SP3, SP4 and SP5 as outlined above. No challenge was made as to these facts by the defence. These elements of the charge are therefore satisfied.

Element (ii): That the accused was 'trafficking' in 2,739g of 3.4 MDMA

[36] Trafficking is defined in the Act as follows: *In this Act, unless the context otherwise requires — trafficking includes* the doing any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, *transporting, carrying,* sending, delivering, procuring, supplying or distributing any dangerous drug [otherwise than under the authority of this Act or the regulations made under the Act];

[37] In the instant case, the charge of trafficking relates to the carrying or transporting of the subject drugs which were found in the suitcase carried by the accused, exh P60. However in order to establish the element of trafficking

against the accused, it is necessary in the first instance to prove that the accused was in possession of the quantity of 2,739g of 3.4 MDMA. In other words, the element of possession is a precursor to that of trafficking. It is not possible to traffic in dangerous drugs unless the accused is found to have been in possession of those drugs. Accordingly it is necessary that the prosecution prove the inherent element of possession in establishing a prima facie case against the first and second accused of trafficking by transporting.

Possession

[38] Possession is not defined in the Dangerous Drugs Act 1952. However it has been defined in numerous cases since. It comprises both a physical and mental element. The physical element is demonstrated by exclusive dominion and control over the subject property, such that the person in possession is able, solely, to do as he pleases/wishes with that property. The mental element or 'mens rea' is denoted by conscious knowledge of the existence and nature of the subject property. If both these constituent elements can be established from the surrounding facts, then it can be said that 'possession' has been established. Direct evidence of each of these elements is the best manner of proof. However, the element of conscious knowledge and existence of the subject property is often not easily established by direct evidence alone, and in matters falling within the Dangerous Drugs Act 1952, the law supports the determination of this issue by allowing for reliance in the form of a rebutted presumption in s 37(d) of the Act. It provides:

[39] In the instant case, the prosecution submitted that it was relying on the statutory presumption in s 37(d) of the Act to establish that the accused had the requisite knowledge of the existence and nature of the 2,379g of 3.4 MDMA. The question that therefore arises for consideration is whether the accused had physical custody and control of the subject drugs. It is not in dispute that the subject drugs were found concealed within the suitcase, exh P60. In order to ascertain whether he had custody and control of the subject drugs it is necessary to determine whether the accused had physical custody and control of the suitcase, exh P60. As borne out by the evidence outlined above, the accused was observed in the delivery hall of KLIA taking physical custody and control of the suitcase, exh P60 from carousel 'D' of the baggage delivery area. He was observed from that point on to have exclusive physical control of the suitcase as he carried it and proceeded towards the green lane, when he was stopped by SP3. Additionally, the suitcase P60 also bore a baggage tag with details which matched the flight on which the accused had landed. The relevant details on the baggage tag also matched the details on the boarding pass issued in the accused's name. This is clear evidence that the accused was legally entitled to and did take physical control and custody of the suitcase, P60. As the subject drugs were concealed within

P60 it follows that the accused had physical custody and control of the subject drugs. This taken in conjunction with s 37(d) of the Act as explained earlier, satisfied for the purposes of this prima facie stage of determination, the requirement that the element of 'possession' which is essential in order to go on to establish trafficking, has been satisfied.

Identity of the 2,739g of 3.4 MDMA

[40] It is necessary in the instant case, to consider the issue of the identity of the exhibit, namely the 2,730g of 3.4 MDMA, so as to ascertain whether the drugs tendered in court and comprising the subject matter of the charge are in fact, the same drugs that were seized from the accused and subsequently tested by the chemist.

[41] The burden of ensuring that the identity of the drugs is not put in issue lies on the prosecution. This burden is routinely discharged by the prosecution calling all relevant witnesses to show that there has been no 'break' in the chain of evidence relating to the custody of the subject drugs. If the chain of evidence is indeed complete, it follows that the identity of the drugs should not be in dispute. In other words if the prosecution establishes a chain of custody of sufficient completeness such that it is unlikely that the subject drugs have been tampered with, exchanged or contaminated, then the identity of the drugs as being that which was seized from the accused is established. The purpose of establishing this complete chain of custody is to ensure that the drug recovered from the accused was the same as that tested by the chemist. It is not however necessary for every person who came into contact with the subject drugs to be called to give evidence on this issue (see *Su Ah Ping v Public Prosecutor* [1980] 1 MLJ 75; *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489).

Is there a gap in the chain of evidence?

[42] As outlined in some detail above, it is not in dispute at the close of the prosecution case that the carbon sheet comprising the underside of the blue board partition and the carbon sheet beneath which the pills were concealed within the suitcase, exh P60, are missing. Additionally, there is a discrepancy between the number of smaller packs of pills photographed in exh P59 Q and that formally recorded by SP6 in the list of seized pill exhibits, exh P72A which was compiled not long after exh P59Q was recorded on 4 November 2003.

[43] The issue that arises for consideration is this; *was the chain of custody of the subject drugs compromised to the extent that doubt is thrown on the identity of the drugs that were subsequently sent to the chemist for forensic evaluation?*

[44] In *Gunalan a/l Ramachandran & Ors*, Abdul Hamid bin Mohamed JCA (as His Lordship then was) said: A

> What has to be proved is that it is the substance that was recovered that was analysed by the chemist and found to be heroin, cannabis, etc., and it is for the trafficking of the same substance that the accused is charged with. The proof of the chain of evidence is only a method of proving that fact. The fact that there is a gap, does not necessarily mean that the fact is not proved. It depends on the facts and circumstances of each case. There may be a gap in the chain of evidence. But if, for example, during that gap the exhibits are sealed, numbered with identification numbers, there is no evidence of tampering, there is nothing that would give rise to a doubt that that exhibit is the exhibit that was recovered in that case and that was analysed by the chemist, the fact that there is a gap, in the circumstances of the case, may not give rise to any doubt of that fact. B C

[45] The evidence adduced by the prosecution in this case in relation to the chain of custody was complete in that all the relevant persons (or one of them if more than one was present at any given time who handled or had sight of the drugs were called to give evidence. To that extent the requirement that the 'chain' of evidence be adduced was satisfied. Despite this however, the evidence adduced by the prosecution as a whole fails to address or explain three notable 'missing' items, namely the two sheets of carbon paper as well as one small pack of red pills which was present at the outset in pack A11 and is captured in exh P59Q. No evidence was adduced to specifically address these discrepancies or 'missing' items. Instead, the prosecution relied on its 'chain' of evidence to maintain that the identity of the drugs was not put in issue. D E F

EVIDENCE OF SP6 ON THIS ISSUE

[46] From the chronology of facts set out above, it is evident that once the subject drugs were found concealed within the layers of the suitcase, exh P60, none of the Customs officers at KLIA handled or removed the drugs or any other part of the suitcase. The suitcase and its entire contents were surrendered to SP6 who is from the Customs Narcotics Unit, by the Customs officers in KLIA, namely SP5. G H

[47] SP6 is the officer who undertook the investigation of the matter. The sequence of events outlined above bears out the fact that it was only when the accused was taken with his baggage to the Customs headquarters then in Lengkok Bellamy that the contents of the bag were actually taken out, marked and photographed. I

[48] At all times based on the evidence adduced and outlined above, it was SP6 who personally either handled the exhibits, or locked them up. He

testified that after the photography session when the entirety of the exhibits were displayed, identified and photographed, he retained possession of the suitcase and its contents while locking up the rest of the exhibits in his office. He was also the sole person who dealt with the exhibits after this as he said he locked all the exhibits in his office, while taking special care to place the pill exhibits in a locked steel cabinet to which only he had the keys. SP6 stated that he took out all the exhibits for the purposes of preparing a list after he had returned from the magistrate's court (to obtain a remand order against the accused). It is at this point that his evidence that he retained custody of all of the exhibits at all times is open to query. SP6's evidence on this point is as follows:

Q: Semasa membawa tertuduh ke mahkamah majistret, exsibit semua di simpan di mana?

A: Di cabinet besi berpalang. 17 bungkusan pil di simpan dalam cabinet besi berpalang dengan padlock dan berkunci. Yang lain saya simpan selamat dalam bilik saya dan hanya saya ada kunci untuk pejabat/bilik saya.

Q: Untuk cabinet kunci berpalang, ada kunci pendua?

A: Ya, tetapi saya juga yang pegang. Untuk bilik pejabat saya, kunci pendua di simpan oleh Ketua Cawangan Narkotik.

[49] Further on in his evidence, when he is identifying the various exhibits as shown in the photographs, exh P59 A–Q, he states as follows:

Q: Rujuk P–72, helaian 3.1 handphone dinyatakan.

A: Saya tidak boleh cam.

Sepanjang sidang akhbar berlangsung, beg bagasi dan kandungan saya bawa masuk ke sidangan tersebut. Beg itu berada di bawah jagaan saya. Beg galas (P-69) saya simpan dalam cabinet berpalang di bilik saya...

Q: Rujuk P–59. *Kamu kata kertas-kertas carbon yang ditunjuk di sana telah hilang. Bagaimana?*

A: *Ketika saya balik daripada Mahkamah, saya tinggalkan kertas ini di kaunter hadapan. Bila saya balik kertas karbon itu sudah hilang.* Mungkin pembersih pejabat telah mengambilnya.

Saya telah mencari di tong-tong sampah dan seluruh bilik saya dan gagal menjumpai. Saya cuba tanya pembersih pejabat tetapi mereka tidak ketahui. Sudah hilang pada tahun 2003. Saya tidak buat apa-apa bila kertas karbon terhilang.

[50] Earlier on in his evidence when he goes through the individual exhibits, identifying them in turn, SP6 states as follows in relation to photograph exh P59F which is a photograph of the suitcase, exh P60, when it is open and the blue board partition removed. It shows the underside of the blue board partition and it shows the loose sheet of carbon, partially torn and lying on top of the layers of pills. In relation to this photograph, SP6 testified as follows:

A: Gambar P59 F ialah gambar lapisan beg selepas dikeluarkan. Terdapat beberapa helai karbon di bawahnya. Kertas karbon ini dah hilang. Kertas karbon di dalam beg telah hilang.

[51] From the foregoing evidence it is clear that the two carbon sheets comprising a part of the suitcase were no longer in SP6's custody by late afternoon on 4 November 2003, as a consequence of his purportedly leaving two carbon sheets at a front counter in the Customs headquarters. Numerous queries arise as a consequence of this evidence:

(a) At least one of the two sheets of carbon was attached to or comprised a part of the underside of the blue board partition with the 'Polo' logo pattern on it, below which the subject pills were concealed. This is shown in exh P59F. The other carbon sheet was not attached to any other partition and was simply lying on top of the seventeen large clear packs of green and red pills. How then did the first carbon sheet come apart from the underside of the blue board partition with the 'Polo' logo/pattern on it?

(b) Why were the two carbon sheets left at a front counter somewhere in the Customs headquarters? Why would SP6 who testified that he took considerable care to ensure that the exhibits were all either within his physical care and control or locked up in a steel cabinet or his office, suddenly leave some of the exhibits in a public area where anyone could have access to it?

(c) The fact that one of the carbon sheets was attached to the blue partition board in the suitcase also begs a consideration of the possibility that not just the two carbon sheets were left at the front counter for a period of time. One of the carbon sheets was an integral part of the suitcase, exh P60, unless it had been detached. Therefore the possibility that the entire suitcase was left at the front counter temporarily also arises. If so, could there have been access to third parties who tampered with the suitcase and its contents?

(d) While this possibility may appear to be somewhat speculative at first blush, it gains ground when it is considered in conjunction with the next missing item, namely one small pack of red pills from the larger

clear pack, All. The fact that this pack appears to have gone missing is borne out, as explained earlier, by a comparison of the photographic exh P59Q which shows that there are fifteen small packs in total contained in All, while the list compiled by SP6 after his return from the magistrate's court on 4 November 2003 only records fourteen small packs in total in All. How did this one pack of red pills go missing if indeed, all the pill exhibits were kept locked in a steel cabinet within SP6's locked office to which only he had keys?

[52] From the chronology of events above, it is evident that there was indeed a gap in the chain of custody or evidence relating to the drugs recovered from the accused. The gap arose when SP6 left unattended at a front counter in the Customs Unit, some part of the exhibits. As a consequence it appears that these exhibits have been tampered with. The tampering comes in the form of the removal of these exhibits, whereby 1 carbon sheet appears to have been detached or removed from its original position on the underside of a partition within the suitcase, and then disappeared together with the other loose carbon sheet and one small pack of red pills. These three items have not been accounted for.

[53] This gap also throws some doubt on the veracity of SP6's evidence. It is no longer clear beyond doubt that all the exhibits were within his control and custody or securely locked away at all times. It opens up the possibility that the exhibits were left unattended for long enough to allow some of them to disappear. This portion of the evidence was not addressed by the prosecution directly, leaving at the close of the prosecution case, a clear discrepancy in the number of packs of pills as well as other material exhibits without any explanation. It is this non-explanation of these missing exhibits which has given rise to break or gap in the chain of custody of the subject drugs.

Does the gap in the chain of custody of the exhibits throw doubt on the identity of the exhibits that were subsequently sent to the chemist for analysis?

[54] The next issue that arises for consideration is whether the 'gap' above throws doubt on the identity of the exhibits recovered from the accused, and sent to the chemist. It may be argued that notwithstanding the loss of three of the exhibits, the balance of the exhibits match identically the exhibits that were recovered from the accused. And what was sent to the chemist was all the packs of pill exhibits save for the one smaller pack containing red pills that went missing. In other words, the packs of pill exhibits that were sent to the chemist appear to be identical to that seized from the accused, save that one pack was missing.

[55] The only evidence that can be used to compare the identity of the pill exhibits that were sent to the chemist by SP6, would be the list of pills compiled by him, namely P72A and that compiled by the chemist, P4. A comparison of the two shows that they match identically. Therefore it can be concluded that the pill exhibits that SP6 sent to the chemist, is identical based on a comparison of P72A and P4. The final charge brought against the accused was based on the complete quantity of pill exhibits sent to the chemist save for the 'missing' red pack of pills. In short, the accused was charged with trafficking in a quantity of the pills less the missing red packet of pills. As such the contention is that the actual identity of the pills that were analysed by the chemist is not in issue because it matches exactly that which SP6 seized from the accused save for the one pack of 'missing' red pills.

[56] However, such a contention is not tenable on the facts of the present case because the aforesaid contention necessitates the making of an assumption that during the gap in the chain of custody of the subject pill exhibits, only one pack of red pills went missing. It does not expel/oust all possibility of the subject drugs being tampered with or exchanged, during that gap.

[57] The gap brings into question too many possibilities as to what happened to the exhibits during that lacuna in the chain of custody, such that it cannot be definitively concluded, without any doubt, that the remaining exhibits were left untampered or unaltered. Several doubts arise including the following:

(i) If one packet of the red pills is missing, and that pack could not have been removed from a locked steel cabinet, then the possibility arises that the packs of pill exhibits were not placed in the locked steel cabinet for some period of time;

(ii) If the exhibits were left unattended for even a short period of time, it is possible that a third party could have taken one of the packs or substituted one of the packs.

[58] As the balance of the drug exhibits that are finally produced in court are no longer in the form of distinguishable pills, but have been ground for the purposes of analysis, the court is unable to verify that the substance before it is in fact identical to the red and green pills found in A1 to A17 respectively. In short the identity of the subject drugs is compromised. It should also be considered that in the instant case, no explanation whatsoever was tendered by the prosecution for the 'missing' pack of red pills. In submission it was only contended that there had been a failure 24 by the defence to cross-examine the relevant witnesses on this issue and as such, the matter should not be given weight/consideration at this late stage. This contention

lacks merit as the burden remains on the prosecution throughout to ensure that the identity of the drugs comprising the subject matter of the charges, is beyond doubt. The failure of the defence to cross-examine specifically on this point, cannot detract from the fact that there is indeed a lacuna in the prosecution's chain of custody which remains unexplained. In *Kumaraguru al N Muniandy & Ors v Public Prosecutor* [1994] 1 MLJ 254 Vincent Ng JC (as His Lordship then was) put it thus:

> It is settled law that in matters concerning the identity of drug exhibits, the proof of which lay with the prosecution throughout the case, no requirement rests on the defence to register any challenge on the issue. The prosecution had failed to establish the identity of the drug exhibits in the court below.

In the absence of any explanation whatsoever for the clear lacuna in the chain of custody, doubt is thrown on the issue of whether the drugs seized from the accused were indeed the drugs that were sent to the chemist for analysis.

How does the evidence of SP6 in respect of the quantity and description of the subject pills compare to that of the chemist SP1 when she received these exhibits?

[59] The foregoing requires a comparison of the evidence of SP6 and that of the chemist, SP1 during the course of the trial, as well as a comparison of the documentary evidence relating to the state of the evidence when it was sent to the chemist and received by her, namely a comparison of exhs P72A, P4 and the chemist's report P6. A detailed study of the same shows that:

Quantity of pills

(a) There were discrepancies between the evidence of SP6 and SP1 in relation to the number of smaller packs of pills found in the large clear plastic pack marked AG2. SP1 gave evidence that the large clear plastic pack, AG2 contained thirteen smaller clear plastic packs each containing 100 green pills with the logo 'CU' on them, while SP6 stated that there were twelve smaller clear plastic packs, each containing 100 green pills with the logo 'CU' on them. However both the chemist's report, P6 and the search list, P72A show that there were thirteen and not twelve packs each containing 100 green pills with the logo 'CU' on them. This bears out SP1's evidence;

(b) There were discrepancies between the evidence of SP6 and SP1 in relation to the number of smaller packs of pills found in the large clear plastic pack marked AG 16. SP1 gave evidence that there were eleven smaller clear plastic packs each containing 100 green pills with the logo 'CU' on them, while SP6 testified that there were twelve such smaller packs. However both the chemist's report, P6 and the search list, P72A

show that there were eleven and not twelve packs each containing 100 green pills with the logo 'CU' on them. This again bears out SPl's evidence.

[60] There was no explanation tendered by the prosecution in respect of these differences in the oral evidence of the investigating officer, SP6 and the chemist, SPl. It was left to the adjudicating authority to determine whether, given the preponderance of documentary evidence favouring the chemist's account of the number of packs of pills, her evidence should indeed be preferred as reflecting the true count. The net effect of these discrepancies was to expose the lack of accuracy in the evidence relating to the total quantity of pills.

Description of pills

[61] A clear and accurate description of the subject pills contributes to the analysis and conclusion that the pills seized from the accused were indeed the same pills that were subsequently analysed by the chemist and produced in court. It is therefore an important element in establishing the chain of custody. It is apparent from the evidence of the witnesses, SP3, SP4, SP5, SP6 and SP1 that a large quantity of 'green' and 'red' pills contained in small clear plastic packs were then packed in groups in larger clear plastic packs. Each of the green pills apparently carried the logo 'CU' on one surface. This is borne out by the oral and documentary evidence of SP1, SP6, exh P72A (the search list) and in the chemist's report, P6. It is only in P4 that the logo is not mentioned. The red pills also had a logo on each of them, although some confusion arose as to the description of the logo and the colour. As the final product exhibited in court was simply a powdery substance, these distinguishing features of the subject pills could not be determined by the court.

[62] The fact that analysis of the subject pills will result in the original pills undergoing an irrevocably altered state underlines the importance of a comprehensive description of the subject drugs by those witnesses who deal with those drugs prior to analysis. Unfortunately in this case there was no such description. The witness ideally placed and trained to provide such a description is the laboratory chemist, whose primary function in the national narcotics laboratory is to identify and analyse the suspected material seized from the accused and to prepare evidence for legal proceedings. These activities require precision and accuracy in order to ensure the legitimate prosecution of persons involved in the illicit drug trade and equally, to protect innocent persons. Such accuracy is required first of all in respect of the description of the 'seized' drugs as this is the unbiased and expert evidence that the court will subsequently rely upon to determine the identity of the

drugs. It therefore cannot be reiterated enough that a comprehensive description of the subject drugs, namely the size, colour, shape, length, width and depth of the pills should be set out. In the instant case, SP1 gave evidence that she did indeed note these salient features, and in fact, took pictures of the subject pills. However these features were not defined or described in the course of her evidence. Where the subject matter of a charge is pills as compared to, for example, cannabis, such a lack of description is critical. This is because unlike cannabis which is simply described as a bloc of dried plant material the description of pills requires that the size, shape, colour and logo on each pill is looked at and described precisely. Additionally in the instant case, the gap in the chain of custody as referred to earlier, had already thrown doubt on the identity of the subject pills. The failure to provide a full description of the pills by SP1 did not assist in verifying the identity of the subject pills.

'Euro' logo or 'Inverted Euro' logo?

[63] A further issue that arose was whether the logo on each of the red pills was that of the 'Euro' or an 'Inverted Euro'. SP1 merely stated on one occasion at the outset of her evidence, by way of general description that the green pills had the logo 'CU' on them and that the red pills had a 'Euro' logo on them. SP6 and the other witnesses described the red pills as having an 'inverted Euro logo' embossed on their surfaces.

[64] It was submitted by defence counsel that this in itself caused confusion and amounted to a material discrepancy. However, if a pill with the Euro logo is viewed from the opposite direction, in other words, if it is turned around, that same logo will appear to be inverted. There is therefore no substance in the suggestion that the logos are in any way different. A photograph would however have assisted in determining this issue simply by viewing the pill from both angles.

What was the actual colour of the 'red' pills?

[65] There were several descriptions in relation to the colour of the 'red' pills. Some witnesses described the pills as red, others as brick-red, and in some documents these pills were referred to as being 'pink'. SP1 simply described them as being red in both her oral and written evidence. SP6 described them as being 'red' in his oral evidence and in exh P 72A, but used the term 'merah bata' or 'brick-red' when describing the same pills in exh P4 which was the list he handed over to SP1 together with the material for analysis. Although these descriptions lacked consistency, this was not, in itself sufficient to raise doubts as to the identity of the subject pills, as the variations in colour did not detract substantially from the fact that the pills essentially

had a red hue. However a clear description by the chemist or a photograph would have conclusively dealt with this issue.

CONCLUSION AS TO THE IDENTITY OF THE SUBJECT MATTER OF THE CHARGE

[66] A consideration of the totality of the evidence above leads to the conclusion that doubt is thrown on the identity of the drugs comprising the subject matter of the charge by reason of the clear gap in the chain of custody. This gap is evidenced by the missing pack of pills and two carbon sheets, for which no explanation was forthcoming from the prosecution. These significant missing links give rise to questions and possibilities that the subject drugs may have been tampered with during the gap in the chain of custody, such that it is not conclusively proven that the identity of the subject drugs is intact and was not at any stage, compromised. In the absence of clear proof as to the identity of the drugs, an essential element in the charge remains unproved, namely that the 2,379g of 3.4 MDMA that was analysed, was identical to that which was seized from the accused. It follows that the elements of 'possession' and thereby 'trafficking' will also fail.

[67] The net result is that it cannot be concluded that the prosecution has established a prima facie case under the charge, (see *Mohd Osman bin Pawan v Public Prosecutor* [1989] 2 MLJ 110; *Lee Chee Meng v Public Prosecutor* [1992] 1 MLJ 322; *Shamsuddin bin Hassan & Anor v Public Prosecutor* [1991] 3 MLJ 314; *Public Prosecutor v Rosli bin Rikidin* [2007] 4 MLJ 377; *Public Prosecutor v Por Chong Beng* [1996] 4 MLJ 467).

'TRAFFICKING' UNDER SECTION 39B(1) OF THE DANGEROUS DRUGS ACT 1952.

[68] In view of the foregoing conclusion it is not necessary to consider whether the accused was in fact 'trafficking' in the subject drugs. For purposes of completion however, it should be noted, that if not for the break in the chain of custody, this element of trafficking would have been made out at this, the prima facie stage. This is because a consideration of the totality of the facts shows that:

(a) The accused was returning by flight from Frankfurt after a trip of five days;

(b) He had in possession a suitcase (exh P60) within which was concealed a large number of red and green pills, namely 3.4 MDMA; he was therefore in possession of those prohibited drugs;

A (c) The quantity of the drugs was in excess of such quantity as he could possibly utilise for his own consumption;

(d) He was therefore transporting a large quantity of prohibited drugs from one jurisdiction to another, which supports the conclusion that he was 'trafficking' in 2,379g of 3.4 MDMA at the close of the prosecution case.

B

[69] However, the fact that there is a serious lacuna in the chain of custody of the pills comprising the subject matter of the charge precludes the possibility of considering the issue of trafficking. The doubt thrown on the identity of the pills which is a fundamental issue can lead to no conclusion other than that a prima facie case has not been established. The accused is therefore acquitted and discharged.

C

D *Accused acquitted and discharged.*

Reported by K Nesan

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